Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2004	MD Docket No. 04-73

COMMENTS OF TYCO TELECOMMUNICATIONS (US) INC.

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SUMMARY

The Commission's regulatory fee regime for private submarine cables is broken. The capacity of private submarine cable systems, including those of Tyco Telecommunications (US) Inc. ("Tyco"), has increased geometrically in recent years, and prices have declined correspondingly. Yet the Commission's nearly decade-old regulatory fee regime lumps private submarine cable operators and facilities-based common carriers together and charges them the same capacity-based fees. Without modification, Commission-assessed regulatory fees will comprise an increasing percentage of capacity costs in a price-sensitive business with very thin margins. Indeed, by the end of last year, in some cases Tyco stood to pay regulatory fees that, assuming constant annual per-unit fees, would total *more than double* the selling price (exclusive of any regulatory fee recovery) for capacity on Tyco's network.

The problem, though, is not merely that private submarine operators' fees are too high. It is that the current regime distorts the broader market for international capacity. *First*, and most important, the current capacity-based regime fails to account for the fact that private submarine cable operators have activated systems with massive capacity in recent years. By charging a capacity-based fee in a market with skyrocketing capacity and decreasing prices, the Commission favors older, lower-capacity systems to the detriment of newer, higher-capacity systems. If an operator were to double the capacity of a system next year, the Commission's cost of regulating that system would not change, but the operator's fee obligation would double. *Second*, the current regime fails to account for the fact that private submarine cable operators are subject to far less regulation—and thus cause far less regulatory cost—than facilities-based common carriers. By placing all international bearer circuit operators together in the same regulatory fee category, the Commission essentially forces private submarine cable operators to

subsidize the regulatory activities of facilities-based common carriers. *Third*, the current regime is at odds with how private submarine cable operators actually sell capacity today. By imposing fees only on "lit and sold" capacity, the Commission requires private submarine cable operators to make distinctions of degree with respect to the applicability of regulatory fees to new, innovative services. This complicates commercial negotiations, distorts the market in favor of certain offerings, and inhibits the rollout of new products and services more generally.

At the same time, today's regime can only be described as a monitoring and enforcement nightmare. The Commission has no way of monitoring active private submarine cable capacity, and thus no real way of enforcing private submarine cable operators' payment of regulatory fees. Moreover, the Commission's current practice of assessing fees based on a "snapshot" of capacity on December 31st of each year creates all sorts of opportunities for submarine cable operators to game the system. The Commission's inability to enforce its rules under the current regime may be one reason why Tyco last year paid 13 percent of all international bearer circuit fees collected from *all* international bearer circuit operators, even though it operates only two of the 48 cables active on the trans-Atlantic, trans-Pacific, and Caribbean-Latin American routes.[1]

The Communications Act forbids this result, because the fees levied on private submarine cable operators no longer bear any relationship to the regulatory benefits they receive. Section 9 of the Act requires the Commission to adjust its fee categories based on "factors reasonably related to the benefits provided to the payor."[2] Tyco urges the Commission to take the following three steps consistent with this mandate.

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1 *See* International Bureau, Federal Communications Commission, *2002 Section 43.82 Circuit Status Data* at 33-34, Table 7 (Dec. 2003) (identifying the 48 active cables, including the Tyco Atlantic and Tyco Pacific cables) ("*2002 Circuit Status Report*").

2 47 U.S.C. § 159(b)(1)(A).

- *First*, the Commission should separate the private submarine cable operator subcategory from the international bearer circuit category by creating a new "private submarine cable operator" category of fees.

- *Second*, the Commission should allocate the revenue requirement now proposed for *all* international bearer circuit operators ($7,065,385 for fiscal year 2004) between the two new categories. In doing so, the Commission must determine the respective regulatory burden caused by the two new categories of payees.

- *Third*, the Commission should adopt a flat, per-cable-landing-license fee for private submarine cable operators.

This solution is consistent with the Act because it ensures that the fees allocated to private submarine cable operators reflect the regulatory costs they generate. More importantly, this solution would serve the public interest, as Section 9 of the Act envisions, because it would address all of the ills associated with the current regime. It would dramatically reduce the current regime's disfavor of newer, higher-capacity systems because every private submarine cable operator would be charged a flat, per-system fee regardless of capacity. It would eliminate the subsidization by private submarine cable operators of facilities-based common carriers, because it would separate the two classes of fee-payers and allocate revenue requirements between them based on the respective regulatory burdens caused by each. It would allow private submarine operators' new and innovative service offerings to stand or fall on their own merits, and reduce opportunities for gamesmanship associated with such services. And it would practically eliminate the Commission's monitoring and enforcement burden.

Tyco urges the Commission to take immediate action to remedy the inequities in its regulatory fee regime for private submarine cable operators. Tyco proposes a simple way to fix this regime that complies with the Act, and it urges the Commission to adopt its proposal in this year's Regulatory Fees Order.

TABLE OF CONTENTS

PAGE

Before the
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In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2004	MD Docket No. 04-73

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Tyco Telecommunications (US) Inc. ("Tyco") urges the Commission to modify its regulatory fee regime for private submarine cable operators.[1] Tyco is concerned that the Commission's current regime for assessing regulatory fees for private submarine cable operators, if left unchanged, will produce fees that comprise an ever-increasing percentage of costs in a competitive market. As private submarine cable operators like Tyco deploy high-capacity, lower-priced systems, the Commission's regulatory fee regime increasingly distorts the international capacity market. These distortions have now reached the point where Tyco stands to pay regulatory fees for capacity that, assuming constant annual per-unit fees, can total more than *double* the selling price for this capacity (exclusive of any regulatory fee recovery). In fact, Tyco alone paid thirteen percent of all international bearer circuit fees collected from private submarine cable operators and facilities-based common carriers in 2003,[2] even though Tyco estimates that it operates less than four percent of all sold international bearer circuits or

1 *See Assessment and Collection of Regulatory Fees for Fiscal Year 2004, Notice of Proposed Rulemaking*, FCC 04-66, MD Docket No. 04-73 (rel. Mar. 29, 2004) ("*NPRM*").

2 *See* Tyco Telecommunications (US) Inc., Form 159 (filed Sept. 18, 2003) (reporting 332,640 active 64 KB circuits, which represents nearly 13 percent of the FCC's estimate of *all* such circuits held by submarine cable and satellite licensees).

equivalents. At the same time, the current regime is extremely difficult and burdensome for the Commission to monitor and enforce—creating opportunities for operators to game the system to the disadvantage of operators that do not.

The Communications Act of 1934, as amended ("Act"), does not compel such a system.[3] To the contrary, Section 9 of the Act mandates that the Commission amend the fee system when, as now, it disserves the public interest or fails to apportion fees in manner that reflects the distribution of regulatory benefits.[4] In light of the Commission's duties under Section 9 of the Act, Tyco urges the Commission to amend the existing fee regime in three simple steps:

- Removing the private submarine cable operator subcategory from the international bearer circuit category and creating a new "private submarine cable operator" category of fees.
- Allocating the revenue requirement now proposed for *all* international bearer circuit operators ($7,065,385) between the two new categories. In doing so, the Commission must determine the respective regulatory burden caused by the two new categories of payees.
- Adopting a flat, per-cable-landing-license fee for private submarine cable operators.

This proposal is entirely consistent with the Act's mandate that the Commission amend the fee system when, as now, the fee allocation disserves the public interest or fails to reflect the allocation of regulatory benefits. Moreover, the proposal resolves all of the ills discussed above.

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[3] Although private submarine cable systems are not licensed under the Communications Act, the Commission has long taken the approach that private submarine cables licensed under the Cable Landing License Act of 1921 are subject to the Commission's regulatory fees. *See, e.g., Assessment and Collection of Regulatory Fees for Fiscal Year 1997, Report and Order*, 12 FCC Rcd. 17,161, 17,187-88 ¶ 68 (1997) ("[N]on-common carrier undersea cable operators and non-dominant common carriers have been subject to the bearer circuit fee since we established our regulatory fee program.").

[4] *See* 47 U.S.C. § 159. Congress included these provisions in the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 397, Title VI, 6002(a) (approved Aug. 10, 1993).

The Commission should therefore adopt this proposal as part of this year's Regulatory Fees Order.

I. BACKGROUND

A. Tyco Telecommunications

Tyco is one of the world's leading integrated suppliers of undersea communications systems and services and the only such U.S.-based supplier. Tyco designs, manufactures, installs, and provides maintenance services for undersea cable systems. Operating a modern fleet of cable ships stationed around the world, Tyco has installed approximately 350,000 kilometers of undersea communications systems. Tyco also operates the Tyco Global Network ("TGN"), one of the most extensive and technologically advanced communications systems ever constructed. TGN spans over 60,000 kilometers and links key telecommunications hubs on three continents through TGN Atlantic and TGN Pacific, for which Tyco holds cable landing licenses from the Commission.[5] The network provides Tyco's customers with a variety of bandwidth options at a wide range of capacity levels.

The deployment of this high-capacity, state-of-the-art network, however, has created perverse regulatory consequences for Tyco. Because Tyco pays regulatory fees based on the amount of active capacity that it sells to companies not holding international Section 214 authorizations, Tyco's current fees can only be described as astronomic.

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[5] *See TyCom Atlantic (US) Inc.; Application for a License to Land and Operate a Private Fiber-Optic Cable System Between the United States Mainland and the United Kingdom, Cable Landing License*, 15 FCC Rcd. 14,881 (2000); *TyCom Networks (US) Inc. and TyCom Networks (Guam) L.L.C.; Application for a License to Land and Operate a Private Fiber-Optic Cable System Between the United States Mainland, Hawaii, Guam, and Japan, The TyCom Pacific Cable System, Cable Landing License*, 15 FCC Rcd. 24,078 (2000).

B. The Current Regulatory Fee Regime for Private Submarine Cables

The Commission does not assess separate regulatory fees on private submarine cable operators—or, for that matter, on submarine cable operators in general. Instead, it groups both private and common carrier submarine cables with other operators of "international bearer circuits."

While it has never codified the scope of those subject to the international bearer circuit regulatory fee, the Commission has made its most definitive statements on the issue in informal fact sheets which it releases each year. The latest version of the fact sheet states:

> Who Must Pay: *Facilities-based common carriers* with active international bearer circuits as of December 31, 2002 in any transmission facility for the provision of service to an end user or resale carrier. . . .
>
> *Private submarine cable operators* are also to pay fees for any and all international bearer circuits sold on an indefeasible right of use (IRU) basis or leased to any customer, including themselves or their affiliates, other than an international common carrier authorized by the Commission to provide U.S. international common carrier services.[6]

Thus, facilities-based common carriers must pay regulatory fees for all of their international bearer circuits, while private submarine cable operators need only pay regulatory fees for bearer

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[6] *Regulatory Fees Fact Sheet: What You Owe—International and Satellite Services Licensees* (July 2003) ("*2003 Fact Sheet*") (emphasis added), *available at* http://www.fcc.gov/fees/factsheets/owe-ib.pdf. The obligation of private submarine cable operators to pay regulatory fees is a broad one, applying to all private submarine cable operators: (1) regardless of the country of incorporation or organization of either the entity holding a cable landing license issued by the Commission, or of that licensee entity's ultimate corporate parent; (2) regardless of whether the carrier or operator sells capacity through the entity holding the cable landing license, or through an affiliated sales or marketing subsidiary; (3) notwithstanding the Commission's regulation of that system as a non-common carrier system; (4) regardless of whether the operator sells the capacity on a lease or IRU basis; and (5) regardless of the nature of the services its customers provide using such capacity.

circuits sold to entities other than common carriers.[7] The Commission exempted capacity sales to carriers holding international Section 214 authorizations in order to avoid double-charging carriers (once for the capacity sale from the submarine cable operator to the U.S. international carrier, and once for the capacity sale from the U.S. international carrier to its customers).[8] In any event, the Commission expects that regulatory fees will be paid once for all active international bearer circuits connecting the United States with foreign points.

As with all other regulatory fee categories, the Commission each year determines how much it needs to collect from international bearer circuit operators. Although the Act specifies that this "revenue requirement" must correlate with the regulatory benefits actually provided to international bearer circuit operators,[9] the Commission has yet to implement a formal and accurate cost-accounting system.[10] In any event, once it calculates the revenue requirement for the international bearer circuit category, the Commission (following the guidance originally set forth in the statute[11]) recovers this revenue by: (1) estimating how much active capacity exists among all international bearer circuit operators; and (2) using this estimate to calculate a fee based on active 64 KB circuits or circuit equivalents. While even the Commission's informal

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7 *See 2003 Fact Sheet.*

8 *See Implementation of Section 9 of the Communications Act – Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, Memorandum Opinion and Order,* 10 FCC Rcd. 12,759, 12,761 ¶¶ 10-11 (1995).

9 *See* 47 U.S.C. § 159(b)(1)(A), (i).

10 *See Assessment and Collection of Regulatory Fees for Fiscal Year 2003,* Report and Order, 18 FCC Rcd. 15,985, 16,040-41 (2003) ("*2003 Fees Order*") (concurring statement of Commissioner Adelstein) (discussing cost accounting); *Assessment and Collection of Regulatory Fees for Fiscal Year 2001*, Report and Order, 16 FCC Rcd. 13,525, 13,529 ¶¶ 7-8 (2001) ("*2001 Fees Order*") (discussing problems with previous cost accounting system).

11 *See* 47 U.S.C. § 159(g); *see also Implementation of Section 9 of the Communications Act – Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, Final Rule,* 59 Fed. Reg. 30,984 (1994) (setting forth initial regulatory fee schedule, including international bearer circuit fees).

written guidance does not address the subject, Commission staff has informally interpreted capacity to be "active" (at least with respect to capacity on fiber-optic systems) when both the fiber is lit and the capacity is sold.

Last year, the Commission calculated a revenue requirement for international bearer circuits in the amount of $6,934,127.[12] Estimating that there would be 2,600,000 active 64 KB circuits or circuit equivalents, it established a regulatory fee of $2.67 per circuit or circuit equivalent.[13] This year, it has calculated a revenue requirement for international bearer circuits in the amount of $7,065,685.[14] Estimating that there will be 2,800,000 active 64 KB circuits or circuit equivalents, it proposes a regulatory fee of $2.52 per circuit or circuit equivalent.[15]

II. THE COMMISSION'S EXISTING REGULATORY FEE REGIME DISTORTS THE MARKET FOR INTERNATIONAL CAPACITY

The Commission's current capacity-based regulatory fee system distorts the market for international capacity in three principal respects, thereby disserving the public interest. *First*, the capacity-based fee regime imposes disproportionate costs on high-capacity submarine cable operators (and on their customers) even though high-capacity operators generate no higher regulatory costs for the Commission than do low-capacity operators. As a result, the Commission overcharges high-capacity operators (thus inflating artificially the prices they charge end users) and subsidizes low-capacity operators. *Second*, the Commission levies the same per-unit charges on common carriers and on private operators, even though private operators impose much smaller regulatory costs on the Commission, as they are not regulated

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12 *See 2003 Fees Order*, 18 FCC Rcd. at 16,032-34.

13 *Id.*

14 *See NPRM* at Att. C.

15 *See id.*

under the Act or the Commission's panoply of Part 63 rules governing international common carriers. *Third*, the capacity-based regime imposes significant but unnecessary transaction costs on, and discourages innovative capacity offerings by, private submarine cable operators. Consequently, capacity purchasers—and ultimately U.S. consumers and business—pay higher prices for international connectivity without any improvement in service quality or efficiency.

A. The Capacity-Based Regulatory Fee Regime Ignores the Fundamental Changes in Technology that Have Produced Exponential Increases in Capacity and Plunging Capacity Prices

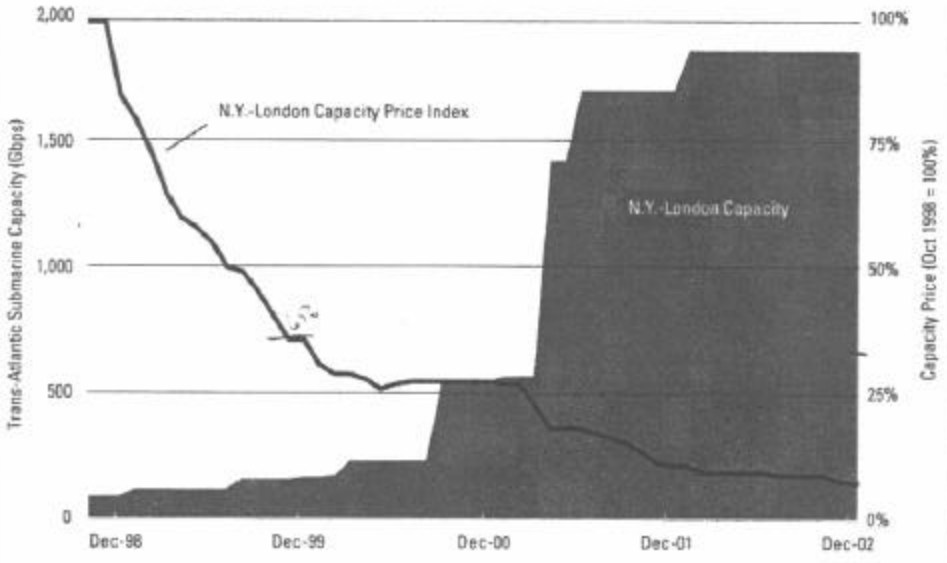
The current regulatory fee structure ignores recent technological developments that have boosted private submarine cable operators' capacity exponentially while slashing the prices they charge. By continuing to assess regulatory fees by reference to a given submarine cable system's capacity, the Commission imposes outsized regulatory fees on operators of high-capacity systems—fees that now comprise a substantial cost component for submarine cable capacity. Given current trends with respect to capacity prices and regulatory fees, the Commission's capacity-based fee regime may soon render uneconomic certain submarine capacity sales.

Congress imposed the original capacity-based fees in 1993 at a time when submarine cable capacity increased annually by relatively small increments. At that time most international submarine cable capacity was operated by carrier consortia on a common-carrier basis. To increase capacity on a given route, those carriers generally invested in new submarine cable systems.

In the last ten years, however, the market for international capacity has changed radically. Operators other than traditional carriers have invested substantial sums in high-capacity systems. These operators can upgrade capacity simply by changing the electronics in the cable stations, allowing for a doubling or more of capacity without putting a new cable in the water. Submarine

operators have increased trans-oceanic capacity more than twenty-fold since 1998 and cut per-unit capacity prices dramatically. As Figure 1 demonstrates, trans-Atlantic capacity jumped by approximately 1800 percent from 1998 to 2002 while trans-Atlantic capacity prices dropped by 90 percent.

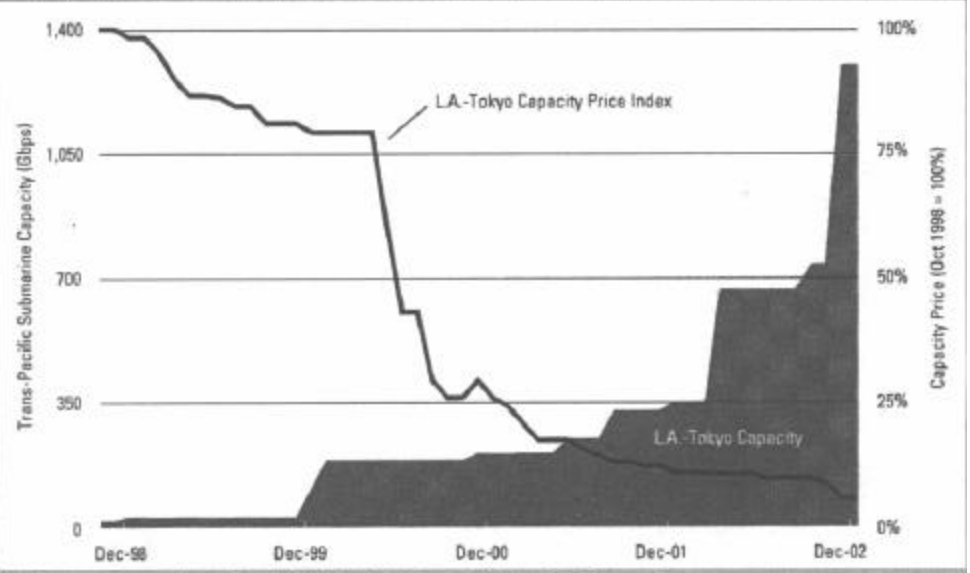
Figure 1. New York – London Capacity vs. Price, 1998-2002



Source: International Bandwidth 2003 Volume 1: Submarine Networks

Likewise, as indicated in Figure 2, trans-Pacific capacity increased by 2500 percent in the same time period while prices declined by 90 percent.

Figure 2. Los Angeles – Tokyo Capacity vs. Price, 1998-2002



Source: International Bandwidth 2003 Volume 1: Submarine Networks

At the same time that capacity has surged and prices have dropped to one-tenth their 1998 level, corresponding per-unit regulatory fees have declined by only 60 percent.[16] Yet the Commission has not taken notice of the commercial reality that prices have plunged as the industry has suffered in recent years. Rather, the Commission has further burdened the industry with disproportionate regulatory fees—which actually rose from fiscal year 2002 to fiscal year 2003 when the market was in its worst slump.

Because the regulatory fees for international bearer circuits have decreased at a much slower rate than the price per unit, the fees represent an increasingly large component of overall per-unit price. For example, the sale price for an indefeasible right of use for a STM-64 high-capacity circuit in 2003 totaled approximately $2.5 million, while the corresponding 15-year regulatory fee will exceed $4.95 million if the annual per-unit fee stays constant at the 2003 level. Even if the annual per-unit fee were to drop by 20 percent per year over the 15-year

[16] In fiscal years 1999 and 2000, the FCC imposed international bearer circuit fees of $7.00 per 64 KB circuit equivalent; in fiscal year 2001 the fee dropped to $5.00 per 64 KB circuit equivalent; in fiscal year 2002 it fell again to $2.00; and in fiscal year 2003 it rose back up to $2.67.

period, the aggregate regulatory fees would total approximately $1.6 million, or nearly 65 percent of the sale price.[17] In other words, Tyco stands to pay *more than double* in regulatory fees for this capacity than it was able to recover for this same capacity (exclusive of any regulatory fee recovery).

This fee structure distorts the international capacity market in favor of low-capacity operators without any justifiable regulatory basis. An operator that upgrades its system by changing the electronics in the cable stations in order to double the capacity suddenly pays double the regulatory fees. Perversely, under the current regime, these fees double even though the Commission exercises no regulatory oversight over such capacity upgrades. Indeed, the operator need not obtain any Commission consent for such a capacity upgrade, and it does not even report such capacity upgrades to the Commission in any periodic filing.

In addition, high-capacity operators today subsidize low-capacity operators when measured against the Communications Act's criterion that regulatory fees mirror regulatory benefit. All other things being equal, a single high-capacity submarine cable system imposes *exactly the same* regulatory costs on the Commission as a single low-capacity submarine cable system, as both require only a single landing license (and, if they are common carriers, both must comply with Title II regulation and the Commission's Part 63 rules). Depending on the actual capacities of their systems, however, the high-capacity operator may pay fees hundreds of times greater than the low-capacity operator. By paying the proportional lion's share, high-capacity carriers subsidize low-capacity carriers because they each generate the same costs on a system-by-system basis.

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[17] Private submarine cable operators cannot assume that per-unit fees will decline at a 20 percent annual rate, considering that the fee *rose* by 33 percent from fiscal year 2002 to fiscal year 2003, and the Commission proposes reducing it by less than six percent from fiscal year 2003 to fiscal year 2004.

B. Under the Capacity-Based Regime, the Commission Over-Recovers Regulatory Fees from Private Submarine Cable Systems

The current regulatory fee regime also requires private submarine cable operators to pay more than their share of the regulatory costs associated with international bearer circuits. This second market distortion flows from the simple truth that common carriers are subject to the panoply of Part 63 regulations promulgated pursuant to Title II of the Act, whereas private submarine cable operators are not.[18] Facilities-based common carriers are subject to a broad range of regulatory obligations that do not apply to private submarine cable operators, and that consume significant Commission resources. These include obligations to:

- Request global authority from the Commission for provision of telecommunications services — a process that entails an analysis of the operator's home market, the WTO status of the operator's home country, and applicable public interest factors;[19]

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[18] The Commission has proposed to eliminate some of these reporting requirements and, more troublingly, to increase the regulatory burdens on private submarine cable operators by requiring them to comply with some of these common-carrier-like reporting requirements. *See Reporting Requirements for U.S. Providers of International Telecommunications Services, Amendment of Part 43 of the Commission's Rules, Notice of Proposed Rulemaking*, IB Docket No. 04-112 ¶¶ 58-60 (rel. April 12, 2004) ("*Reporting Requirement NPRM*"). The Commission's proposal to increase the reporting-related regulatory burden of private submarine cable operators is wholly inconsistent with the Commission's 2002 streamlining and further deregulation of private submarine cable operators, and indeed with the very foundations of non-regulation of private submarine cable operators. *See Review of Commission Consideration of Applications under the Cable Landing License Act*, *Report and Order*, 16 FCC Rcd. 22167 (rel. Dec. 14, 2001); *see also Tel-Optik Limited; Application for a license to land and operate in the United States a submarine cable extending between the United States and the United Kingdom*, *Memorandum Opinion and Order*, 100 F.C.C.2d 1033, 1046-48 ¶¶ 28-31 (rel. April 5, 1985) (concluding that private submarine cables are subject to the Cable Landing License Act, but not to the panoply of Title II regulation that applies to common carriers). The Commission should reject as illegitimate any attempt to equalize the regulatory costs of common carriers and private submarine cable operators by greatly increasing the regulatory burdens on private submarine cable operators through a "leveling up" process.

[19] *See* 47 U.S.C. § 214; 47 C.F.R. § 63.18.

- File with the Commission all intercarrier contracts, including any correspondent agreements;[20]
- File annual traffic reports with the Commission;[21]
- File annual circuit status reports with the Commission;[22]
- Comply with the FCC's international settlements policy, which establishes benchmark rates and deadlines;[23] and
- Provide adequate notice to all affected customers before discontinuing, reducing, or impairing service.[24]

In other words, private submarine cable operators generate only a fraction of the regulatory costs common carriers generate for "enforcement activities, policy and rulemaking activities, user information services, and international activities,"[25] yet the current system requires them to pay the same per-unit regulatory fees. By charging all international bearer circuit operators the same regulatory fees, the Commission thus forces private submarine cable systems to subsidize common carrier submarine cable systems and satellite systems.

As a consequence of the existing regime's subsidies in favor of low-capacity operators (described in part II.A. above) and in favor of facilities-based common carriers, private high-capacity operators shoulder a disproportionately large regulatory fee burden. Indeed, Tyco alone paid thirteen percent of all international bearer circuit fees collected from private submarine

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[20] *See* 47 C.F.R. §§ 43.51(a), 63.21(b).

[21] *See* 47 C.F.R. §§ 43.61(a), 63.21(d).

[22] *See* 47 C.F.R. § 43.82.

[23] *See* 47 C.F.R. § 63.10(e).

[24] *See* 47 C.F.R. § 63.19.

[25] 47 U.S.C. § 159(a)(1).

cable operators and facilities-based common carriers in 2003.[26] This share of the regulatory fee burden is particularly startling because Tyco estimates that it operates less than four percent of all sold international bearer circuits or equivalents. Tyco's share is also excessive considering that Tyco operates only two of the forty-eight cables active on the trans-Atlantic, trans-Pacific, and Caribbean-Latin American routes,[27] and Tyco's private capacity offerings do not impose any Title II regulatory costs on the Commission.

C. The Commission's Existing Regulatory Fee Regime Ignores How Operators Actually Sell Private Submarine Cable Capacity and Thwarts Their Cost Recovery Efforts

Today's capacity-based fee regime for private submarine cable operators is also at odds with the way such operators actually capacity, resulting in yet another set of distortions. Under the existing regime, submarine cable operators expend significant regulatory resources trying to determine whether and when fees apply, often reaching different conclusions for very similar services, and hesitating to offer particular services given the difficulty in making sense of the Commission's fee regime in light of particularly innovative offerings. This regulatory uncertainty hampers operators' cost recovery efforts.

Commission staff deems capacity on fiber networks to be "active" (and thus subject to regulatory fees) only when two conditions are present—the fiber must be "lit," and the capacity in question must be sold (that is, money must actually change hands). This "lit and sold" standard may have been adequate when applied to a traditional capacity sale or lease. But it

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[26] *See* Tyco Telecommunications (US) Inc., Form 159 (filed Sept. 18, 2003) (reporting 332,640 active 64 KB circuits, which represents nearly 13 percent of the FCC's estimate of *all* such circuits held by submarine cable and satellite licensees).

[27] *See 2002 Circuit Status Report* at 33-34, Table 7 (identifying the 48 active cables, including the Tyco Atlantic and Tyco Pacific cables).

works less well when applied to the panoply of newer capacity offerings that today's customers now demand from private submarine cable operators.

First, operators often sell what might be called "risk-management" or "insurance-like" offerings, which de-couple customer payments from the lighting, allocation, or use of capacity. For example, private submarine cable operators (including Tyco) offer a "restoration" service, whereby the customer pays up front for the ability to use back-up capacity at a later date in the event of a primary circuit failure. The operators price the service on the probability that the customers will actually use the capacity, with the presumption that they will not do so except in extreme circumstances, such as cable damage resulting from commercial fishing operations or underwater seismic activity. Similarly, private submarine cable operators (including Tyco) offer usage-based services, whereby a customer pays a set amount for capacity that may fluctuate or ramp up over time. In each of these cases, it is extremely difficult to apply the Commission's "lit and sold" rule of thumb with respect to regulatory fees, as the payment is generally made up front for capacity that may never be activated or allocated for a particular customer.

Under the current regulatory fee regime, private submarine cable operators find themselves forced to make distinctions of degree with respect to the applicability of regulatory fees to these kind of services—for example, between the "restoration" service described above (which is presumably subject to regulatory fees) and a "reservation" service, where customers make a very small payment to reserve unlit capacity (and which is therefore presumably not subject to regulatory fees). Parsing through these kinds of distinctions consumes significant regulatory resources. Moreover, such parsing causes extraordinary difficulty in commercial negotiations with customers who often do not understand the vagaries of the Commission's regulatory fee system.

Second, operators often sell capacity under long-term arrangements—sometimes as long as 15 years—with a single payment up front. Regulatory fees on this capacity, however, are assessed every year. Thus, there is often a disconnect between operators' receipt of revenues for given capacity and their obligation to pay regulatory fees for such capacity.

The inability of the Commission's antiquated regulatory fee regime to account for new and innovative capacity offerings creates economic distortions that favor certain services and capacity offerings over others (and, perhaps, favor submarine cable operators that stretch the boundaries of the law over those that do not). Moreover, the current regime can prevent private submarine cable operators from adequately recovering their costs. This, in turn, hinders the offering of innovative service offerings and capacity arrangements more generally.

III. THE COMMISSION'S CURRENT REGULATORY FEE REGIME FOR SUBMARINE CABLES IS DIFFICULT FOR THE COMMISSION TO ADMINISTER

Completely apart from the harm it causes private submarine cable operators and their customers, the current regulatory fee regime also makes the Commission's job of monitoring and enforcing its regulatory fees rules far more difficult than it should be. Inadequate monitoring and enforcement increases carriers' ability to avoid payment—in turn, increasing the burden on those that do pay.

To begin with, the Commission has no means of monitoring active private submarine cable capacity, and thus no real way of enforcing private submarine cable operator's payment of regulatory fees. The International Bureau calculates its payment units each year based primarily on the previous year's payment records, meaning that the accuracy of the Commission's estimates is only as good as operators' compliance with the Commission's regulatory fee obligations.

This calculation may systematically underestimate the amount of active capacity subject to regulatory fees. This year, the Commission has issued an estimate of 2,800,000 "payment units" for international bearer circuits—that is, nearly three million active 64 KB circuit equivalents. This number is quite similar to the 2,844,862 number of "active circuits" reported in the most recent circuit status report, which suggests that the Commission may base its regulatory fee estimates on the circuit status report.[28] The circuit status report is, of course, an inappropriate tool for monitoring active capacity for *regulatory fee* purposes. Only U.S. licensed common carriers file circuit status reports.[29] Private submarine cable operators do not—although the Commission is proposing to change this.[30] At least for now, however, the Commission estimates that "reported active" submarine cable circuits represent only seven percent of total estimated (not necessarily active) submarine cable capacity.[31] If indeed the Commission is basing its regulatory fee estimates on circuit status report data, it is ignoring the majority of potential fee-payers.

Regardless of where the International Bureau derives its figures, however, the predictable result of any such self-reporting system is that bearer circuit operators that *do* report and pay their regulatory fees subsidize those that do not. In this regard, Tyco notes again that it reported 332,640 active 64 KB circuits this past year.[32] This represents nearly thirteen percent of the Commission's estimate of *all* such circuits held by submarine cable and satellite licensees, a surprising figure given Tyco's share of the overall market for international capacity.

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[28] *See 2002 Circuit Status Report* at 30, Table 5.

[29] *See id.* at 2-3.

[30] *See Reporting Requirement NPRM* ¶¶ 58-60.

[31] *See 2002 Circuit Status Report* at 34, Table 7.

[32] *See* Tyco Telecommunications (US) Inc., Form 159 (filed Sept. 18, 2003).

Moreover, assessing fees based on a "snapshot" of capacity on December 31st of each year creates additional opportunities for mischief. Submarine cable operators, for example, can ask customers to pay for capacity purchases on the first of January, so as to avoid having such capacity considered "active" for purposes of regulatory fees. Such gamesmanship obviously makes the Commission's monitoring and enforcement job more difficult.

IV. THE CAPACITY-BASED FEE REGIME DOES NOT COMPORT WITH SECTION 9 OF THE COMMUNICATIONS ACT BECAUSE THE FEES CHARGED BEAR LITTLE RELATIONSHIP TO THE COMMISSION'S REGULATORY COSTS

Section 9 of the Communications Act requires the Commission to recover through annual regulatory fees the costs that it incurs in carrying out enforcement actions, policymaking and rulemaking activities, international services, and user information services.[33] In order to ensure that regulated entities pay only their fair share of these cost-recovery fees, the Act instructs the Commission to amend its fee schedules to reflect the regulatory costs generated by particular categories of operators. In this vein, Section 9(b)(1)(A) requires the Commission to derive its regulatory fees "by determining the full-time equivalent number of employees performing the [regulatory activities for the service in question] . . . adjusted to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities."[34]

Section 9(i) of the Act requires the Commission to develop "accounting systems necessary to making the adjustments" that would ensure that an operator's regulatory fees reflect the regulatory costs it generates.[35] Despite this statutory command, the Commission no longer prepares a direct accounting of its regulatory costs. Instead, the Commission takes the previous year's pro-rated revenue requirements for each category (which were originally calculated using

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[33] *See* 47 U.S.C. § 159.

[34] 47 U.S.C. § 159(b)(1)(A).

[35] 47 U.S.C. § 159(i).

an accounting system plagued by insufficient and incorrect data[36]) and adjusts those figures to account for any additional revenue required by Congress.[37]

In contravention of Section 9, the fees levied by the Commission on private submarine cable operators bear little relationship to the Commission's cost of regulating them. In the absence of true accounting of regulatory costs, the current capacity-based regime violates the mandates of Section 9 in two core respects.

First, the capacity-based regime relies on the Commission's tally of "active capacity" in apportioning fees, even though an operator's active capacity does not reflect the regulatory costs it generates. As explained in part II.A. above, capacity bears little relationship to the actual costs the Commission incurs in regulating international bearer circuit operators. If, for example, Tyco were to double the capacity next year on TGN Atlantic, the Commission's cost of regulating that system would not change, nor for that matter would the benefits to Tyco of such regulation. Yet, under today's regime, Tyco would owe twice as much in regulatory fees for that system. Thus, as a consequence of the capacity-based fee regime, high-capacity carriers pay a disproportionate share of the regulatory cost. This result is plainly inconsistent with the Section 9's requirement

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[36] *See*, *e.g.*, *2001 Fees Order*, 16 FCC Rcd. at 13,529 ¶ 8 (noting that "developing a regulatory fee structure [under a previous accounting system] based on available cost information sometimes did not permit us to recover the amount that Congress required us to collect").

[37] Commissioner Adelstein has observed that the Commission's annual "quasi-automatic" markup is insufficient because it "does not truly recover the costs for regulatory fees on a service by service basis." *2003 Fees Order*, 18 FCC Rcd at 16,040-41 (Concurring Statement of Commissioner Adelstein). To the contrary, as Commissioner Michael Copps explained, the annual fee amendments amount to nothing more than "across-the-board proportionate increases from the previous year's schedule of fees." *Id.* at 16,039 (Concurring Statement of Commissioner Copps).

that fees be "reasonably related to the benefits provided to the payor of the fee by the Commission's activities."[38]

Second, the existing capacity-based system also violates Section 9 of the Communications Act because it imposes the same fees on all international bearer circuit operators even though the Commission spends significantly less money regulating private submarine cable systems than it does regulating facilities-based common carriers. As explained in part II.B. above, facilities-based common carriers are subject to Title II regulation and, as a result, they burden the Commission with significant regulatory costs for "enforcement activities, policy and rulemaking activities, user information services, and international activities."[39] Private submarine cable operators, by contrast, create comparatively little regulatory costs because they are not subject to Title II regulation.

Despite these vast differences in regulatory costs, the current system requires private cable operators to pay the same per-unit regulatory fees as all other international bearer circuit operators. Capacity-based fees are therefore incompatible with Section 9 of the Act because, with respect to private submarine cable operators, they are not "reasonably related to the benefits provided to the payor of the fee by the Commission's activities."[40]

V. TO ELIMINATE ECONOMIC DISTORTIONS AND TO COMPORT WITH SECTION 9 OF THE COMMUNICATIONS ACT, THE COMMISSION SHOULD ADOPT A PER-CABLE-LANDING-LICENSE REGULATORY FEE FOR PRIVATE SUBMARINE CABLES

In the preceding sections, Tyco has described a regulatory fee regime that—at least with respect to private submarine cable operators—badly needs repair. In this section, Tyco presents a simple way to repair it.

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[38] 47 U.S.C. § 159(b)(1)(A).

[39] 47 U.S.C. § 159(a)(1).

[40] 47 U.S.C. § 159(b)(1)(A).

A. Tyco Urges the Commission to Adopt a Flat Per-Cable-Landing-License Regulatory Fee for Private Submarine Cables

Tyco's proposal consists of three parts. *First*, the Commission should separate the private submarine cable operator subcategory from the international bearer circuit category by creating a new "private submarine cable operator" category of fees. Under this proposal, there would be two *separate* categories of fees related to international bearer circuits—facilities-based common carriers would be in one category, and private submarine cable operators would be in the other.

Second, the Commission should allocate the revenue requirement now proposed for all international bearer circuit operators ($7,065,385) between the two new categories. In doing so, the Commission must determine the respective regulatory burden caused by the two new categories of payees.[41] As discussed above, facilities-based common carriers cause the Commission far greater regulatory burden than do private submarine cable operators. Under Section 9 of the Act, the Commission's allocation must reflect this disparity.

Third, the Commission should adopt a flat, per-cable-landing-license fee for private submarine cable operators. In other words, each private submarine cable operator would pay a flat annual fee for each cable landing license it possesses. This system-based approach would ensure that the Commission recovers regulatory costs from all of the private submarine cable operators that generate such costs. Accordingly, the per-license approach ensures that each private submarine cable operator's fees better reflect the regulatory costs it imposes on the Commission.

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[41] As previously noted, Section 9(b) of the Communications Act requires the FCC to derive its regulatory fees "by determining the full-time equivalent number of employees performing the [regulatory activities for the service in question] . . . adjusted to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities." 47 U.S.C. § 159(b)(1)(A).

B. System-Based Fees Rectify the Market Distortions that Exist Under the Capacity-Based Regime

In contrast to the existing capacity-based regulatory fee regime, Tyco's proposed system-based regime would apportion fees in a manner that more closely reflects the regulatory costs each system generates. Such a regime would eliminate each of the three market distortions that currently afflict operators and end users.

First, a system-based regime would remove the distortions resulting from recent dramatic increases in cable capacity. As explained above in part II.A. above, the Commission today overcharges high-capacity submarine cable operators because the operators' higher capacities increase their fee obligations even though capacity has no impact on the Commission's regulatory costs. The proposed system-based regime would rectify this subsidy in favor of low-capacity operators instantly by apportioning regulatory fees in a manner that reflects the Commission's actual regulatory costs. Since the Commission generally incurs regulatory expense on a system-by-system basis, not on a capacity basis, charging flat per-system fees would eliminate the current regime's bias against high-capacity operators.

Second, the proposed system-based regime would remedy the subsidy that private submarine cable operators provide to facilities-based common carriers under the current regime. As explained in part II.B. above, today's capacity-based fee regime requires private submarine cable operators to pay more than their share of the regulatory costs associated with international bearer circuits. By separating private submarine systems (which generate smaller regulatory costs) from other international bearer circuit operators (which generate larger regulatory costs) for purposes of regulatory fee recovery, the Commission can ensure that all international bearer circuit operators and end users are exposed to prices that reflect actual market conditions and costs, not prices resulting from subsidies caused by an out-of-date regulatory regime.

Third, Tyco's proposal would eliminate distortions related to innovative capacity offerings. Under a system-based regime, a private submarine cable operator would no longer have to spend time and money determining, for example, whether (and when) a risk-management service triggers regulatory fees, or convincing skeptical customers that its interpretation of the Commission's fee guidance is correct. Moreover, it could simply offer capacity on whatever basis its customers wanted, rather than on a basis that it thought would avoid regulatory fees. A system-based fee for private submarine cable operators would thus make commercial negotiations easier, place all operators on a level playing field, and, most importantly, allow new products and services to rise and fall on their own merits rather than as a result of regulatory-fee distortions.

C. Section 9 of the Communications Act Mandates that the Commission Amend its Fee Regime, Such as by Adopting a Per-Cable-Landing-License Fee Regime

Section 9 of the Communications Act, which mandates that the Commission recover regulatory costs by levying fees on regulated entities, also requires the Commission to adjust and amend the fee collection system to ensure that regulated entities pay only their fair share of the fees. Section 9(b)(1)(A), for example, *requires* that fees reflect "factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities . . . and other factors that the Commission determines are necessary in the public interest."[42] If the Commission determines that current fees do not reflect the public interest or the regulatory costs

[42] 47 U.S.C. § 159(b)(1)(A).

generated by a particular entity, the statute *commands* the Commission to amend its fee schedule.[43]

As explained in part IV above, the current capacity-based fee regime contravenes the requirements of Section 9 of the Act because it overcharges private, high-capacity submarine cable operators and results in market distortions that disserve the public interest. The proposed system-based regime for private submarine cable operators, by contrast, comports fully with the Act. This proposal would advance the public interest, as required by Section 9(b)(1)(A) of the Act, by eliminating these overcharges and distortions. Moreover, the system-based proposal would better align international bearer circuit operators' fees with the regulatory costs they create, thereby ensuring the proportionate cost recovery required by the Act.[44] Most importantly, by implementing the proposed system-based fee regime, the Commission could fulfill its statutory obligation to amend regulatory fees when (as now) the existing system disserves the public or fails to reflect fee payers' regulatory costs in a proportional manner.[45]

D. System-Based Fees Would Remedy the Monitoring and Enforcement Problems Created by the Current Capacity-Based Fee Regime

Last (but by no means of least importance), a system-based fee for private submarine cable operators would virtually eliminate the monitoring and enforcement problems created by the current capacity-based regime. The Commission would, for example, no longer have to rely on operators' own regulatory fee paperwork in order to estimate payment units. Nor would it

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[43] *See* 47 U.S.C. § 159(b)(3) ("[T]he Commission shall . . . amend the Schedule of Regulatory Fees if the Commission determines that the Schedule requires amendment to comply with the requirements of paragraph (1)(A).").

[44] *See* 47 U.S.C. § 159(b)(1)(A) (authorizing "adjust[ments] to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities").

[45] *See* 47 U.S.C. § 159(b)(3).

need to impose intrusive and burdensome reporting requirements to ensure that all private submarine cable operators pay their share of the fees.

Under a system-based fee regime, monitoring fee payers and the amounts they each must pay would be simple. The universe of fee payers would consist of every private submarine cable operator with a cable landing license. The amounts to be paid would be derived by dividing the revenue requirement for private submarine cable operators by the number of cable landing licenses held by such operators. These figures are publicly available and easily verifiable. As such, the Commission's enforcement and monitoring burden would virtually disappear.

CONCLUSION

For the foregoing reasons, Tyco urges the Commission to amend its fee regime as required by Section 9 of the Communications Act. In particular, the Commission should separate the private submarine cable operator subcategory from the international bearer circuit operator category, allocate the international bearer circuit revenue requirement between the two new categories in accordance with the Act, and apply a flat per-cable-landing-license fee for private submarine cable operators.

Respectfully submitted,

/s/

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